Editor's note: 94 I.D. 56; Reconsideration denied by Order dated Aug. 3, 1987

PAGE

SOUTHWEST RESOURCE COUNCIL

IBLA 86-1217 Decided March 10, 1987

Appeal from a decision of the District Manager, Arizona Strip District, Bureau of Land Management, approving a plan of operations for the Pinenut Project. AS 010-86-047.

Affirmed.

1. Mining Claims: Environment -- National Environmental Policy Act of 1969: Environmental Statements

   A finding that a proposed uranium mining operation will not have a significant impact on the human environment and, therefore, that no environmental impact statement is required, will be affirmed on appeal when the record establishes that relevant areas of environmental concern have been identified and the determination is the reasonable result of environmental analysis made in light of measures to minimize environmental impacts.

2. National Environmental Policy Act of 1969: Environmental Statements

   A regional environmental impact statement is required in only two instances: (1) when there is a comprehensive Federal plan for the development of a region, and (2) when various Federal actions in a region have cumulative or synergistic impacts on a region.

3. Federal Land Policy and Management Act of 1976: Surface Management -- Mining Claims: Surface Uses

   Application of the "unnecessary or undue degradation" standard presumes the validity of the use which is causing the impact and seeks to determine whether the

impact is greater than should be expected to occur if the activity were conducted by a prudent operator in the usual, customary, and proficient conduct of similar operations.

4. Federal Land Policy and Management of 1976: Surface Management -- Mining Claims: Surface Uses

When BLM determines, after such notice and opportunity for hearing as may be required by due process, that a mining claim is not supported by a discovery of a valuable mineral deposit, it may declare that mining claim null and void and reject a proposed plan of operations submitted for that claim.

APPEARANCES: Lori Potter, Esq., Denver, Colorado, and Mark Hughes, Esq., Denver, Colorado, for appellant; Patrick J. Garver, Esq., Salt Lake City, Utah, for Intervenor Energy Fuel Nuclear, Inc.; Fritz L. Goreham, Esq., Office of the Regional Solicitor, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Southwest Resource Council (SRC) has appealed from a decision of the District Manager, Arizona Strip District Office, Bureau of Land Management (BLM), dated April 25, 1986, approving a major modification of a plan of operations submitted by Energy Fuels Nuclear, Inc. (EFN), for the Pinenut Project (AS-010-86-10P). After receipt of initial pleadings, this Board granted appellant's motion for expedited consideration by Order of October 30, 1986. Subsequent filings having been made, this case is now ripe for a decision on its merits. For the reasons set forth below, we hereby affirm the decision of the District Manager. Initially, however, it will be helpful to briefly describe the Pinenut Project and its environs.

The Pinenut Project is one of a number of uranium properties being developed by EFN on the Arizona Strip. The Arizona Strip consists of those lands in Arizona lying north of the Colorado River as it descends to its outlet in the Gulf of California. Total acreage of the Arizona Strip is approximately 3,400,000 acres. Included in this figure, however, are substantial areas within Grand Canyon National Park, Grand Canyon National Game Preserve, various wilderness areas, and Indian reservations. Thus, the amount of land open to mineral exploration and development is substantially less than the total acreage in the Arizona Strip.

A total of five mines are presently being operated by EFN on the Arizona Strip. These five, together with the Pinenut mine, are all located within a 20-mile radius in an area north of the Grand Canyon National Park and west of the Kanab Creek wilderness area. The Pinenut mine, which is closest to the park boundaries, is roughly 3.6 miles from the north boundary of the park. In addition to these facilities, EFN has a considerable exploration program ongoing in the general area.

The uranium deposits in this area are typically found in structures known as "breccia pipes." These breccia pipes were created by the action of water dissolving parts of the deep Redwall Limestone formation millions of years ago. Over the passage of time, stratigraphically higher formations have collapsed forming narrow cylinders, which have been shown to be favorable areas for mineral deposition. One of the results of this phenomenon, however, is that while high-grade mineral deposits can often be found in these pipe structures, the mineralized body is normally quite small. This is borne out by the EFN experience in the area. Thus, all production from

three mines, the Hack Nos. 1, 2, and 3, is scheduled to cease in 1987, at which point reclamation will commence. Production at the Pigeon mine commenced in 1985 and is expected to end in 1989. Commercial production is not scheduled to begin at the Kanab North mine until 1988 and based on known ore reserves, it is estimated that mining will be completed in 5 years. The Pinenut mine, itself, is not projected to go on-line until 1989, with production anticipated to last approximately 5 years from that date. It is also important to note that the nature of the ore bodies resulting from the localized breccia pipe accumulations also results in limited surface disturbances. Thus, the total surface disturbance associated with mining the Pinenut deposit (exclusive of access improvement and provision of power) is 20.1 acres.

Topographically, the area is characterized by gently sloping plateaus and mesas abruptly separated by deep canyons. Climatically, the area is semi-arid, with cool winters, warm summers, and light precipitation. However, while annual precipitation ranges only between 8 to 20 inches, the area is subject to intense localized summer showers. Historically, the inaccessibility of the Arizona Strip, occasioned by the Grand Canyon, has resulted in the remote and isolated nature of the area. To a large extent, it still retains a fundamentally remote character, though increased activities, including those associated with mining, have had some impact.

The Pinenut Project was initiated in July 1984, when EFN filed a plan of operations for purposes of exploration. Under the plan, less than 5 acres

were to be disturbed. 1/ An Environmental Assessment (EA) was prepared at that time. Upon discovery of what EFN considered to be a commercially valuable uranium deposit, it submitted a major modification of the existing plan on January 10, 1986. Accordingly, BLM proceeded to examine the new proposal. In doing so, BLM prepared a new EA (EA No. AZ-010-86-015), based upon its own analysis and those submitted by EFN and interested third parties. The resulting document contains over 117 pages of text, including maps and charts. Particular attention was paid to possible air quality and acoustical impacts on Grand Canyon National Park, as well as any radiological effects which might result from the mining and transportation of the uranium ore. In addition, BLM examined the impacts that might occur as the result of upgrading 17 miles of existing access, including the possibility that this might lead to an increase in vandalism to cultural resources made more accessible. BLM also analyzed the visual impact that would result from the construction of a 8.3-mile power line running from Hack Canyon to the Pinenut site. BLM also consulted with the State Historic Preservation Officer (SHPO), who agreed that there would be no adverse impact on a recently discovered archaeological site, AZ B:6:44 (BLM), provided a recovery plan was implemented. Based on these analyses, BLM concluded that approval of the modified plan of operations, subject to various mitigating measures, 2/ would result in no

1/ Since less than 5 acres were to be disturbed, EFN was not required to file a plan of operations. Under 43 CFR 3809.1-3, a "notice of intent" would have sufficed. See generally Bruce W. Crawford, 86 IBLA 350, 92 I.D. 208 (1985).

2/ Among the many mitigating measures imposed were requirements that the workers be bussed to the site to avoid impacts that might be generated were they allowed to individually drive their cars, that the powerline be dismantled upon completion of mining at the request of the authorized officer, and that EFN institute a dust abatement program during any period of prolonged drought.

significant impact to the environment. This finding of no significant impact (FONSI) made it unnecessary for BLM to prepare an environmental impact statement (EIS).

On April 25, 1986, BLM approved the plan of operations subject to the various modifications set forth in its Decision Record. Notification of this decision was sent to various interested parties including appellant. On May 22, 1986, appellant filed its notice of appeal.

Appellant presents three general arguments in seeking to have the Board reverse the decision of the District Manager. First, it argues that BLM failed to consider the cumulative and synergistic impacts of adding the Pinenut mine to other past, present, and reasonably foreseeable mining and exploration activities. Second, appellant contends that BLM must prepare a comprehensive regional EIS for uranium development in the Arizona Strip, pursuant to the mandate of section 102 of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332 (1982). Finally, it argues that BLM failed to consider potential profitability of the Pinenut mine in determining that it would not result in undue or unnecessary degradation. We will discuss these contentions seriatim.

Appellant argues that BLM either failed to consider or inadequately considered cumulative and synergistic of uranium mining, particularly those which might result from what appellant referred to as "reasonably foreseeable uranium actions." Appellant contends that BLM ignored EFN's

stated development plans for the area 3/ as well as concerns expressed by the Park Service relating to the problems which were being generated as additional areas on the North Rim were being made more accessible. Appellant also claims BLM's analysis of cumulative impacts associated with access roads was "utterly inadequate" (Statement of Reasons at 9).

In its answer, BLM takes issue with all of appellant's arguments. BLM notes that its entire discussion of the existing environment necessarily included consideration of cumulative past activities and their effect on the environment. Concerning reasonably foreseen future impacts, BLM notes that, for both minesite activities and general exploration, no such cumulative or synergistic impacts could be identified. This was a result of both the limited area of surface disturbance, and the fact that as all of the studies BLM had performed or commissioned had shown, such impacts as did exist dissipated dramatically over very short distances. Thus, BLM argues, only the addition of a minesite extremely proximate to the Pinenut site could be shown to have any synergistic effect. A view of the terrain and EFN's past exploration activities convinced BLM that there was no reasonable possibility of development of such a minesite in any meaningful time frame. 4/

3/ Appellant referred to a 1983 statement by the Vice-President of EFN declaring the company's hope of finding one new mine a year and also referenced a statement by the Park Service alluding to 30 to 40 additional ore deposits which EFN was said to have identified.

4/ BLM noted in its EA that the lowest probabilities for additional mining occurred south and east because of the existence of Grand Canyon Park and Game Preserve and the Kanab Creek wilderness area, areas which are closed to mineral location. Other factors, such as past exploration activities, indicated that the closest possible mining facility would be at least 3 miles west of Pinenut, a distance substantially greater than the range of effects for impacts emanating from Pinenut.

Insofar as ongoing exploration activities were concerned, BLM noted in the EA that over 90 percent of those sites had already been rehabilitated.

BLM further points out that it considered the cumulative effects of upgrading and extension of existing roads in the area. It disagrees with appellant's characterization of its analysis as "utterly inadequate." Rather, BLM argues, it carefully analyzed this problem, and as a result, a number of mitigating measures were proposed to minimize impacts on the remote nature of the area. BLM states that, far from ignoring cumulative impacts, it added the discussion of such impacts to the final EA after various parties, including appellant, had criticized the draft EA for failing to address this possibility. BLM also notes that while the Park Service did, indeed, voice some objectives to the draft EA, BLM was able to satisfy its concerns by adopting numerous mitigating measures in the final EA.

EFN also filed an answer to appellant's statement of reasons challenging appellant's its contention that the EA inadequately considered reasonably foreseeable future cumulative effects and generally reiterating the arguments advanced by BLM. Pointing to the scheduled closing and commencement of reclamation at the three Hack mines, EFN notes that, unless three new mining sites are identified by early 1987, the current mining levels will not be maintained, much less increased. EFN argues that rather than showing any synergistic effects emanating from the operation of the Pinenut mine and other existing or reasonably foreseeable mines, appellant has merely indulged in argument with no supporting factual data or technical analysis. EFN contends that appellant has clearly failed to meet its burden as delineated

in prior Board decisions such as Tulkisarmute Native Community, 88 IBLA 210 (1985), and John A. Nejedly, 80 IBLA 14 (1984).

[1] At the outset of our review, it is useful to set forth the standard which the Board has developed for reviewing challenges to FONSI declarations. Thus, in William E. Tucker, 82 IBLA 324 (1984), this Board stated that:

> The reasonableness of a finding of no significant impact has been upheld where the agency has identified and considered the environmental problems; identified relevant areas of environmental concern; and made a convincing case that the impact is insignificant, or if there is significant impact, that changes in the project have sufficiently minimized such impact. Como-Falcon Coalition, Inc. v. United States Department of Labor, 465 F. Supp. 850 (D. Minn. 1978), aff'd as modified, 609 F.2d 342 (8th Cir. 1979), cert. denied, 446 U.S. 936 (1980). In such circumstances, we will affirm a finding of no significant impact. John A. Nejedly, 80 IBLA 14 (1984).

Id. at 327.

In the instant case, appellant has failed to challenge any of the site-specific studies which served as a predicate for BLM's finding of no significant impact. Rather, it has relied solely upon what it perceives as a failure to include analysis of cumulative impacts resulting from existing and reasonably foreseeable future developments. 5/ Insofar as impacts related to

5/ We recognize that appellant has also objected to the failure of BLM to consider the cumulative impact of five operating mines on surface water. The EA, however, noted that EFN had agreed to increase the capacity of its holding pond to withstand a 500-year event and further concluded that even if a discharge were to occur no significant impact could be expected because of the dilution of mineralized materials. Given the localized nature of a downpour necessary to trigger a 500-year event, the likelihood that one would occur simultaneously at all operating minesites must be considered extremely remote. Even should such a diluvian event come to pass, the dilution of minerals that would necessarily result underlines BLM's conclusion that no adverse cumulative impact will occur.

the minesite are concerned, it is clear from the scientific studies that have been performed and which are uncontradicted by any submission from appellant that there are no synergistic effects from specific minesites unless they are located in close physical proximity to each other. Moreover, the small size of the minesites (aggregating total of less than 120 acres, including the Pinenut mine) strongly supports BLM's conclusion of insignificant impacts as a result of actual mining activities. Inasmuch as there is absolutely no indication of any likelihood that a minesite will be located sufficiently close to Pinenut to generate synergistic effects, it is feckless to contend that BLM failed to adequately consider such impacts relating to minesite activities.

The possible cumulative impacts of road construction and upgrading, however, are a different matter. Clearly, as more and more roads are either constructed or improved, the possibility of adverse impact on the relatively remote nature of the area might be expected to increase. But, contrary to appellant's allegations on appeal, BLM did consider the cumulative impacts of roads in the area. See EA at 54-55. In order to minimize possible depredations associated with road upgrading (no additional roads are to be constructed), the EA recommended requiring the Pinenut access road to be returned to its original "pre-disturbed" condition at the discretion of the authorized officer when operations terminated, and also provided that the first three-eighths of a mile of the access road would be upgraded only to the minimum necessary to meet safety standards to discourage visitor use of the area (EA at 96). In the opinion of BLM, the limited nature of the road-upgrading, when viewed in conjunction with the mitigating measures adopted, resulted in no significant impact being created by the upgrading of access

to the Pinenut mine. Appellant may disagree with the conclusions which BLM reached, but simple disagreement, absent a showing of error in BLM's analysis, is insufficient to overcome BLM's determination. 6/ See In re Otter Slide Timber Sale, 75 IBLA 380, 384 (1983).

While appellant argues that BLM failed to adequately consider the effect of future roads, appellant has not advanced any means by which BLM could have attempted such an endeavor. In the absence of any indication as to the situs of future mines, it would be totally speculative and conjectural to attempt to estimate how roads to such mines might impact upon the environment. Any such analysis would be so speculative that it would serve no useful purpose, even if it could be attempted. See Glacier-Two Medicine Alliance, 88 IBLA 133, 143 (1985). In view of the above, we must reject appellant's assertions that BLM failed to adequately consider cumulative and synergistic effects of uranium mining in the area.

Appellant also argues that BLM is required to prepare a comprehensive EIS covering uranium development on the Arizona Strip, 7/ a position which

6/ We also note that while any powerline would certainly constitute a visual intrusion, the powerline from Hacks Canyon to the Pinenut mine will not be visible from the Park. See EA at 48. Furthermore, as a mitigation measure, the plan of operations was amended to include a provision authorizing BLM to direct dismantling of the line upon completion of operations. See EA at 93. We are unable to discern any significant impact from this aspect of the plan of operations.

7/ There is a clear inconsistency involved in appellant's delineation of the "region" for which it argues that an EIS is required. Thus, at times it argues that there is "a well-defined geographic area bordering the Park, Kaibab National Forest, Grand Canyon National Game Preserve and the Kanab Creek Wilderness Area" (Statement of Reasons at 19). This specific area, shown on its Exhibit C, embraces approximately one-tenth the total Arizona Strip. Yet, when it seeks to discuss impacts, it includes activities throughout the entire Arizona Strip. See Exh. L. It is by no means clear just what "region" appellant contends the EIS should cover.

appellant contends has been supported by the Park Service and members of BLM's staff. Appellant states that Federal courts have required regional EIS's in comparable situations, which it characterizes as one involving "a steady flood of similar activities in a well-defined area" marked by "the inadequacy of previous project-by-project environmental analyses" (Statement of Reasons at 23). In support for its position, appellant relies on the decisions in National Wildlife Federation v. Benn, 491 F. Supp. 1234 (S.D.N.Y. 1980), involving issuance of ocean dumping permits, and Conner v. Burford, 605 F. Supp. 107 (D. Mont. 1985), which concerned issuance of oil and gas leases in two national forests.

Both BLM and EFN contest appellant's factual predicates and legal analysis. They deny that there has been any "flood" of similar activities, EFN pointing out that only two new plans of operation were filed in 1986, one for the Pinenut and another which was subsequently withdrawn. See EFN's Response at 25-26. Both take exception to appellant's claim that the EA was inadequate. And both argue that appellant has misstated the applicable law which, they assert, clearly supports BLM's position that no regional EIS is required, citing Kleppe v. Sierra Club, 427 U.S. 390 (1976), Peshlakai v. Duncan, 476 F. Supp. 1247 (D.D.C. 1979), and LaRaza Unida v. United States, No. 80-208HB (D.N.M. Nov. 30, 1981).

[2] At the outset, we note that the controlling legal guidelines for determining when a regional EIS is required were established by the Supreme Court in Kleppe v. Sierra Club, supra. In Peshlakai v. Duncan, supra, the district court summarized the Supreme Court's holding as follows: "[S]uch

environmental impact statements are required in two and only two instances: (1) when there is a comprehensive federal plan for the development of a region, and (2) when various federal actions in a region have cumulative or synergistic environmental impacts on a region." Id. at 1258.

Clearly, there is no comprehensive Federal plan for the development of the uranium resources located on the Arizona Strip. Nor has appellant shown that various Federal actions have had cumulative or synergistic environmental impacts on the region. We have previously discussed why the nature of the uranium developments within the vicinity of the Pinenut mine have minimal cumulative and synergistic effects. We will not repeat that discussion here. What we will focus on, however, is the nature of the "federal action" which occurs in the context of approval of mining plans of operations for unpatented mining claims.

Insofar as the location of mining claims is concerned there is, quite simply, no Federal action. Since 1866, it has been the policy of the United States that its public domain mineral lands are generally open to the initiation of claims by its citizens. Over the years, of course, Congress has seen fit both to limit the minerals which are subject to appropriation, as well as to restrict the areas in which the mining laws operate. But, the essential nature of the mining laws has remained constant, viz. individual citizens initiate rights by the discovery of valuable mineral deposits.

Soon after the passage of NEPA, this Board examined the question whether issuance of a mineral patent could constitute a "major federal action" such

as could necessitate the preparation of an EIS. In United States v. Kosanke Sand Corp. (On Reconsideration), 12 IBLA 282, 80 I.D. 538 (1973), we decided that question in the negative. The Board first reviewed the applicable law:

> The discovery of a valuable mineral deposit within its limits validates a mining claim located on public land in conformance with the statute, and its locator acquires an exclusive possessory interest in the claim, a form of property which can be sold, transferred, mortgaged, or inherited, without infringing the paramount title of the United States. * * * Such an interest may be asserted against the United States as well as against third parties, * * * and may not be taken from the claimant by the United States without due compensation. * * * The holder of a valid mining claim has the right, from the time of location, to extract, process and market the locatable mineral resources thereon.
>
> Upon satisfaction of the requirements of the statute, the holder of a valid mining claim has an absolute right to a patent from the United States conveying fee title to the land within the claim, and the actions taken by the Secretary of the Interior in processing an application for patent by such claimant are not discretionary; issuance of a patent can be compelled by court order. * * * The patent may contain no conditions not authorized by law. * * * The claimant need not, however, apply for patent to preserve his property right in the claim, but may if he chooses continue to extract and freely dispose of the locatable minerals until the claim is exhausted, without ever having acquired full legal title to the land. * * * The patent, if issued, conveys fee simple title to the land within the claim, but does nothing to enlarge or diminish the claimant's right to its locatable mineral resources. [Citations, footnotes omitted.]

Id. at 289-91, 80 I.D. at 542.

The Board then examined the statutory language of section 102 of NEPA and concluded that "[t]he plain meaning of the statutory language connotes an action proposed to be taken by a federal agency which is discretionary in character and to which there may exist a viable alternative." Id. at 294, 80 I.D. at 544. Noting that the location, perfection, and maintenance of a

mining claim were all acts performed by the mining claimant, none of which constituted Federal action, the Board declared that issuance of a patent in response to these activities (an action which admittedly was a Federal action) was not discretionary within the meaning of NEPA, and, thus, an EIS could not be required. The Board's analysis was ultimately upheld in South Dakota v. Andrus, 614 F.2d 1190 (8th Cir.), cert. denied 449 U.S. 822 (1980).

We have spent considerable time reviewing the Kosanke decision because it brings into focus two considerations which impinge upon the issue whether a regional EIS is required: the question of what "federal action" is involved and, assuming some Federal action can be delineated, the scope of discretion which may properly be exercised by the Department.

It is clear that no Federal action is involved in the act of prospecting for minerals or locating claims. These activities occur through the volition of private entities acting under statutory authority. Nor do we perceive that any "federal action" within the meaning of section 102 of NEPA occurs when BLM receives a "notice of intent" filed pursuant to 43 CFR 3809.1-3, where less than 5 acres of land are being disturbed in any calendar year. 8/ As we noted in Bruce W. Crawford, 86 IBLA 350, 391, 92 I.D. 208, 230-31 (1985), BLM neither approves nor disapproves a notice. Accord, Sierra Club v. Penfold, A-86-083 Civil (D. Alaska, Jan. 9, 1987). It may consult with a mining claimant over aspects of his activities but, under the present regulatory scheme, it may not bar his planned activities, absent a

8/ We note that a plan of operations rather than a notice of intent must be filed for any activities other than casual use involving certain categories of land, enumerated at 43 CFR 3809.1-4(b). The lands involved in the instant appeal are not such special category lands.

showing that unnecessary or undue degradation will occur. 9/ However, actions leading to unnecessary or undue degradation were never authorized under the mining laws. Id. at 366, 92 I.D. at 217-20.

When a mining claimant is required to file a plan of operations, however, BLM has considerably more leeway. It may make its approval contingent upon acceptance of various modifications designed to prevent or mitigate undesired impacts. Such modifications may make it more difficult or more expensive for the claimant to develop the property. BLM may require design changes in plant operation or in the route of access. BLM may not, however, absolutely forbid mining or totally bar access to a valid mining claim. 10/ See Utah v. Andrus, 486 F. Supp. 995, 1011 (D. Utah 1979). The reason, of course, is that such action would totally frustrate the congressional policy, as expressed in the mining laws, which accord a mining claimant rights, even against the Government, upon the discovery of a valuable mineral deposit. Thus, while BLM clearly has some discretion in the approval of mining plans of operations, there are parameters which establish the limits of its exercise. Nevertheless, because of BLM's ability to modify plans submitted, we agree that approval of a mining plan of operations is Federal action within the scope of 42 U.S.C. § 4332 (1982).

9/ Contrary to appellant's contentions, "unnecessary or undue degradation" assumes the validity of the use, such as actual mining operations, and relates only to the question whether the surface disturbance is greater than what would normally be expected when the activity was accomplished by a prudent operator performing customary and proficient operations. See 43 CFR 3809.0-5(k). This issue is explored in greater detail below.

10/ This discussion presumes the validity of the mining claim. Thus, if the claim is located on lands not subject to the operation of the mining law or for minerals which have been removed from location, BLM may prohibit mining and declare the claim invalid after providing such notice and opportunity to be heard as may be required by the dictates of due process. See Discussion, infra.

Whether or not such approval constitutes "major federal action significantly affecting the quality of the human environment," however, is a question of fact determinable only within the confines of a specific case. It is to be expected that some plans of operations might have impacts of such a nature so as to compel the preparation of an EIS, even given the fact that BLM lacks authority to totally prevent mining in the context of approving a plan of operations. Indeed, the regulations clearly contemplate such an eventuality. See 43 CFR 3809.1-6(a)(4). We agree with appellant that there may be situations in which Federal-approval of discrete mining plans of operations ultimately necessitate the preparation of a regional EIS because the mining activities result in synergistic or cumulative impacts which are best considered in a unified document. However, under the guidelines established by the United States Supreme Court in Kleppe v. Sierra Club, supra, the existence of such impacts is the mechanism which triggers the necessity of filing a regional EIS, and it is on this issue that appellant has failed to carry the day. The record establishes that there is no realistic possibility of cumulative or synergistic effects related to the actual mining operations. And, insofar as access problems are concerned, BLM's imposition of mitigating measures clearly limits any short-term impacts and provides mechanisms for totally eliminating any long-term ones. It may be that, sometime in the future, the nature or pace of uranium mining on the Arizona Strip may change to such an extent that the cumulative or synergistic impacts of proposed plans of operations might be adequately examined only within the confines of a regional EIS. However, in view of the projects actually proposed at the present time, we agree with BLM's conclusion that a regional EIS is not now required.

Appellant's final challenge to BLM's decision is that BLM cannot determine whether "unnecessary or undue degradation" is occurring absent a determination that a valuable mineral deposit has been discovered. Thus, appellant argues that "any degradation of the federal lands caused by the development or extraction of minerals is necessarily undue and unnecessary if there exists no right to enter such lands" (Statement of Reasons at 28).

BLM responds by arguing that appellant has totally misinterpreted the thrust of the prohibition against unnecessary and undue degradation. BLM notes that the express purpose of 43 CFR Subpart 3809 is "to establish procedures to prevent unnecessary or undue degradation of Federal lands which may result from operations authorized by the mining laws." 43 CFR 3809.0-1. Operations authorized by the mining laws run the full gambit from prospecting, discovery, and assessment work to the development, extracting, and processing of the mineral. See 43 CFR 3809.0-5(f). BLM asserts that "[i]n recognition of this fact, it is not the policy of the Bureau of Land Management to determine profitability or validity of mining claims before approving plans of operations" (BLM Answer at 35-36). While we agree that determination of the question whether unnecessary or undue degradation will occur necessarily assumes the validity of the use which is causing the impact, we do not agree with BLM that it is precluded from determining the validity of a claim and, upon a proper determination of invalidity, denying approval of a plan of operations therefor.

[3] Our decision in Bruce W. Crawford, supra, examined, at considerable length, the interrelationship between the determination whether a use

was "reasonably incident" to mining and the determination that a use resulted in "unnecessary or undue degradation." Therein, we concluded:

> The key distinction to keep in mind is that the "reasonably incident" standard resolves questions as to the permissibility of a use by determining whether or not the use is reasonably incident to the mining activities actually occurring. The "unnecessary or undue degradation" standard comes into play only upon a determination that degradation is occurring. Upon such an initial determination, the inquiry then becomes one of determining whether the degradation occurring is unnecessary or undue assuming the validity of the use which is causing the impact. For, if the use is, itself, not allowable, it is irrelevant whether or not any adverse impact is occurring since that use may be independently prohibited as not reasonably incident to mining. [Emphasis in original, footnote omitted.]

Id. at 396, 92 I.D. at 233. This analysis comports with the regulatory definition of "unnecessary or undue degradation," as being any

> surface disturbance greater than what would normally result when an activity is being accomplished by a prudent operator in usual, customary, and proficient operations of similar character and taking into consideration the effects of operations on other resources and land uses, including those resources and uses outside the area of operations.

43 CFR 3809.0-5(k). We reiterate our earlier conclusion that application of the "unnecessary or undue degradation" standard presumes the validity of the use.

[4] However, independent of any question of degradation, BLM always retains the authority to examine the validity of claims to Federal land and, if convinced that they are not well-founded, to take steps to nullify them. As an example, if the claims involved in the instant case were determined

to be null and void because they were located after the lands had been closed to mineral entry, BLM would not be required to approve the mining plan of operations simply because it did not result in any unnecessary or undue degradation. On the contrary, the correct course of action would be to declare the claims null and void ab initio and reject the plan of operations. Similarly, if BLM determined that the claims were not supported by a discovery, the proper course of action would be to initiate a contest as to the claims' validity and suspend consideration of the plan of operations pending the outcome of the proceedings. 11/

In the instant case, appellant argues that BLM has not established that the operations will be profitable. This is not the test. The mining laws do not require a showing that a mine will be profitable but merely that there is a reasonable expectation of success in developing a paying mine. See In re Pacific Coast Molybdenum Co., 75 IBLA 16, 28-30, 90 I.D. 352, 359-60 (1983). Moreover, appellant ignores the fact that, in this appeal, it is the party alleging that the claim is invalid. See In re Pacific Coast Molybdenum Co., supra at 22, 90 I.D. at 356. Thus, it is appellant's obligation to present evidence which, at a minimum, establishes a reasonable basis for a conclusion that the claims are not supported by a discovery. Id. Appellant has submitted no information, whatsoever, that would justify such a conclusion. Fanciful speculation will not suffice.

11/ During such a period, BLM would be required to allow the performance of any operations that are necessary (including assessment work) for timely compliance with the requirements of Federal and state laws. See 43 CFR 3809.1-6(d).

We conclude, therefore, that appellant has failed to show that any unnecessary or undue degradation, as defined by 43 CFR 3809.0-5(k), will occur, or to provide any evidence in support of its allegation that these claims are not supported by a discovery.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed for the reasons stated herein.

James L. Burski
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

R. W. Mullen
Administrative Judge.